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No. 00-1531 & 00-1711

IN THE
SUPREME COURT OF THE UNITED STATES

VERIZON MARYLAND INC.,
Petitioner,

v.

PUBLIC SERVICE COMMISSION OF MARYLAND, ET AL.,
Respondents.

UNITED STATES OF AMERICA
Petitioner,

v.

PUBLIC SERVICE COMMISSION OF MARYLAND, ET AL.,
Respondents

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR RESPONDENT

Susan Stevens Miller
General Counsel
Maryland Public Service Commission
6 Saint Paul Street
Baltimore, Maryland 21202
(410) 767-8039

October 26, 2001

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether a federal district court has subject matter jurisdiction under 28 U.S.C. §1331 to review State commission actions taken pursuant to the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§151 *et seq.*

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BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

This case involves federal court review of an order entered by the Public Service Commission of Maryland ("Maryland Commission" or "MDPSC"). The Maryland Commission is an agency of the State of Maryland and it supervises and regulates telecommunications carriers in Maryland. As part of its responsibilities, the Maryland Commission administers and enforces the *Public Utility Companies Article ("PUC Article")* of the Maryland Code. Final orders or decisions of the Maryland Commission are subject to judicial review in Maryland circuit courts, *PUC Article*, §3-204. Parties are entitled to further review by the Maryland Court of Special Appeals. *Id.* at §3-209.

This case began at the Maryland Commission when Verizon Maryland, Inc. ("Verizon") filed a request for declaratory ruling asking that the Maryland Commission find that Verizon was not obligated under §251 of the Telecommunications Act of 1996 ("1996 Act") to pay reciprocal compensation for calls delivered to Internet Service Providers ("ISPs") who are served by competitive local exchange carriers ("CLECs"). The Maryland Commission issued a declaratory ruling finding that Verizon must continue to pay reciprocal compensation and Verizon sought review of this order pursuant to §252(e)(6) of the 1996 Act, 47 U.S.C. §251 et. seq. and 28 U.S.C. §1331.

The District Court of Maryland dismissed Verizon's complaint, finding that both the Maryland Commission and the individual commissioners were immune from suit under the Eleventh Amendment (Pet. App. 77a-84a);[1] and also

[1] "Pet. App." refers to the Appendix to Verizon Maryland, Inc.'s Petition No. 00-1531.

finding that the Eleventh Amendment would bar suit brought pursuant to 28 U.S.C. §1331 (Pet. App. 90a). On appeal, the United States Court of Appeals for the Fourth Circuit held that the Maryland Commission did not waive its Eleventh Amendment immunity when it implemented the 1996 Act. (*Id.* at 14a - 21a). The Fourth Circuit further found that the *Ex parte Young*[2] doctrine did not permit an action against the individual commissioners in their official capacity. (*Id.* at 21a - 30). The Court also found that a State commission's action interpreting or enforcing an interconnection agreement under the 1996 Act was not a "determination" under 47 U.S.C. §252(e)(6). (*Id.* at 30a - 47a). Finally, with regard to the issue presented in this case, the Fourth Circuit held that 28 U.S.C. §1331 does not provide a federal district court with independent subject matter jurisdiction to review a decision rendered by a State commission pursuant to the 1996 Act. (*Id.* at 50a).

A. THE TELECOMMUNICATIONS ACT OF 1996

Congress enacted the 1996 Act, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. §251 et seq.), to open the local telecommunications markets to competition.[3] The

[2] *Ex parte Young*, 209 U.S. 123 (1908).

[3] At the time the 1996 Act was passed, 19 states had in place rules opening the local exchange market to competition. In seven states, competing firms already had begun to offer switched local service. These states were California, Illinois, Maryland, Massachusetts, Michigan, New York and Washington. Competition rules were in place in Arizona, Colorado, Connecticut, Florida, Georgia, Iowa, Louisiana, North Carolina, Ohio, Oregon, Tennessee and Virginia. See, *Common Carrier Competition Report*, CC Report No. 96-9, FCC, Common Carrier Bureau (Spring 1996) at page 3.

1996 Act[4] imposes a general duty on all telecommunications carriers to interconnect with other telecommunications carriers. 47 U.S.C. §251(a). With regard to incumbent local exchange carriers ("ILECs") such as Verizon, the duty to interconnect is even more specifically defined by §251(c)(2). In conjunction with these interconnection obligations, the 1996 Act requires all local exchange carriers to establish reciprocal compensation arrangements for the transport and termination of telecommunications. 47 U.S.C. §251(b)(5). For purposes of compliance with this subsection, the 1996 Act provides that such terms and conditions must provide for the recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carriers. Further, such terms and conditions must determine costs on the basis of a reasonable approximation of the additional costs of terminating such calls. 47 U.S.C. §252(d)(2)(A). However, ILECs may negotiate and enter in a binding agreement with a requesting carrier without regard to the standards set forth in subsections (b) and (c) of §251.

The procedures for negotiations between Competitive Local Exchange Carriers ("CLECs") and ILECs are governed by §252 of the 1996 Act. If negotiating companies cannot reach agreement, §252 provides that the parties may request that the appropriate State commission arbitrate unresolved issues. Each interconnection agreement must be submitted to the State commission for approval, regardless of whether the agreement was negotiated by the parties or arbitrated by the State commission. 47 U.S.C. §252(e)(1). However, the State commission may only reject a negotiated agreement if it finds that the agreement discriminates against a telecommunications carrier, or the implementation of such

[4] *See*, 47 U.S.C. §§251-261. The 1996 Act is codified throughout Title 47 of the United States Code. References to the 1996 Act are to the relevant sections of the Code.

an agreement is not consistent with the public interest. 47 U.S.C. §252(e)(2)(A).

B. PROCEEDINGS BEFORE THE MARYLAND COMMISSION

Pursuant to the 1996 Act, MFS Intelenet of Maryland, Inc. ("MFS") and Verizon entered into an interconnection agreement on July 16, 1996. The Maryland Commission approved this agreement on October 9, 1996. On April 28, 1997, Verizon informed MFS that it would discontinue payment of reciprocal compensation for calls to ISPs, claiming that the Agreement's reciprocal compensation provisions did not apply to calls to ISPs. On May 21, 1997, MFS filed a complaint with the Maryland Commission alleging that the actions of Verizon violated the 1996 Act and the MFS Agreement. On September 11, 1997, the Maryland Commission found that Verizon must pay reciprocal compensation to MFS for calls to ISPs under the terms of the Agreement. The Maryland Commission's decision was upheld by the Circuit Court for Montgomery County, Maryland.[5]

The Maryland Commission considered this issue a second time within the context of a Sprint Communications Company, L.P. ("Sprint") arbitration complaint. Sprint filed a Motion for Resolution of Disputed Issue, seeking a Commission ruling on how ISP-bound calls should be treated. The Maryland Commission concluded that ISP-bound calls "are classified as local in nature and are therefore, subject to reciprocal compensation" from Verizon.

On February 26, 1999, the Federal Communications Commission ("FCC") released an Order addressing the

[5] *Bell Atlantic Maryland, Inc. v. Maryland Public Service Commission*, Civil Action No. 178260, Docket Entry #26, March 26, 1998.

jurisdictional status of calls to ISPs.[6] The FCC concluded that "ISP-bound traffic is jurisdictionally mixed and appears to be largely interstate." However, the FCC further concluded that given the absence of a "federal rule regarding the appropriate inter-carrier compensation mechanism for this traffic, that parties should be bound by their existing interconnection agreements, as interpreted by State commissions."[7] The *ISP Order* held that a carrier's right to reciprocal compensation for calls to ISPs was governed by the terms of the parties interconnection agreement. (Pet. App. 96a-97a). The FCC further held that there is "no reason to interfere with state commission findings" regarding ISP compensation *ISP Order* ¶21. The FCC described several factors that State commissions might consider in determining whether parties had agreed to pay reciprocal compensation for calls to ISPs. One factor was that for years both the FCC and ILECs traditionally treated calls to ISPs as local. ¶¶23-29. Pet. App. 97a-99a. In response to the *ISP Order*, Verizon asked the Maryland Commission to reconsider the previous decisions requiring reciprocal compensation for calls to ISPs.

On June 11, 1999, the Maryland Commission resolved the issue raised by Verizon. The Order has two distinct parts. First, with regard to the negotiated agreement, the Maryland Commission found that, under contract principles and using the analysis sanctioned by the FCC, parties to the agreement were entitled to reciprocal compensation for ISP-bound calls until July 1, 1999. (Pet. App. 103a-104a). Second, the Maryland Commission determined that parties who do not have approved interconnection agreements should receive the arbitrated

[6] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Declaratory Ruling, CC Docket 96-96, 14 F.C.C.R. 3689 (February 26, 1999). ("*ISP Order*")

[7] *Id.*, at para. 1. See, also, para. 22.

reciprocal compensation rates contained in the effective Statement of Generally Available Terms ("SGAT") as an interim compensation mechanism until the FCC establishes an appropriate inter-carrier compensation mechanism for ISP-bound traffic. (Pet. App. 106a-107a).

C. THE DISTRICT COURT DECISION

Verizon sought review of the Maryland Commission's Order in the United States District Court for the District of Maryland. First, Verizon objected to the Maryland Commission's determination that Verizon should continue to pay reciprocal compensation for ISP-bound calls pursuant to the terms of the previously approved interconnection agreement. Verizon also objected to the Maryland Commission's determination that CLECs who do not have approved interconnection agreements shall receive the arbitrated reciprocal compensation rates contained in the effective SGAT as an interim compensation mechanism.

On October 20, 1999, the District Court dismissed Verizon's Complaint, holding that: (1) the Maryland Commission and the individual commissioners were immune from suit under the Eleventh Amendment[8] (Pet. App. 77a-84a); (2) the Maryland Commission was an indispensable party under Federal Rule of Civil Procedure 19(b) so that the case could not proceed without the Commission (Pet. App. 84a- 86a); (3) alternatively, Verizon's challenge to that portion of the Commission's Order relating to the SGAT was not ripe for review (Pet. App. 86a-90a) and (4) the Eleventh Amendment would bar suit brought pursuant to 28 USC §1331. (Pet. App. 90a).

[8] Based on this holding, the District Court declined to address the Maryland Commission's contention that the Court lacked jurisdiction to review Commission decisions **enforcing** interconnection agreements (Pet. App. 76a n.3)

D. THE FOURTH CIRCUIT DECISION

Verizon and the United States Government appealed the District Court's decision. On February 14, 2001, the United States Court of Appeals for the Fourth Circuit affirmed the District Court's decision. The Fourth Circuit reached four major conclusions. First, and foremost, the Court of Appeals found that the federal proceeding brought pursuant to §252(e)(6) of the 1996 Act against the Maryland Commission is constitutionally barred. The Fourth Circuit expressly found that Congress did not clearly manifest an intent to condition a State commission's participation in the regulation of interconnection agreements on a waiver of sovereign immunity from private suit. (Pet. App. 19a).

Second, and equally important, the Fourth Circuit also found that an action brought in federal court against the individual commissioners was constitutionally barred. Among other reasons, the Court of Appeals found that a federal court action against the State commissioners would improperly expand the federal remedy selected by Congress. (Pet. App. 29a).

The third determination by the Fourth Circuit was that §252(e)(6) does not confer jurisdiction on the federal courts to review a State commission's enforcement decisions. The Fourth Circuit found that because federal courts are courts of limited jurisdiction, decisions by State commissions that are not expressly designated for review in federal court are left for review by State courts. (Pet. App. 35a). The Court of Appeals then held that State commission orders administering and enforcing interconnection agreements are not §252 determinations (Pet. App. 47a). Thus, according to the Court, these orders are reviewable only by State courts. (*Id.*)

Finally, with regard to federal question jurisdiction, the Fourth Circuit held that 28 U.S.C. §1331 does not provide federal jurisdiction because Congress intended federal jurisdiction to be limited to the grant in 47 U.S.C. §252(e)(6). The Court of Appeals found that it "would be nonsensical to conclude that even though Congress carefully articulated jurisdictional responsibility in the 1996 Act, it nonetheless intended to have 28 U.S.C. §1331 override this effort." (Pet. App. 48a). According to the Fourth Circuit, "[t]he simple fact that interconnection agreements are "creations of federal law" does not make their interpretation a sufficiently substantial federal question to confer jurisdiction under 28 U.S.C. §1331." (Pet. App. 49a) (citations omitted).

Judge King dissented, concluding that: (1) §252(e)(6) expressly confers jurisdiction on the federal courts to review the State's enforcement determinations; (*Id.* at 56a); (2) the States waived their sovereign immunity by participating in the regulation of interconnection agreements; and (3) the individual Commissioners could be sued for prospective injunctive relief. (*Id.* at 67a.) Judge King found it unnecessary to reach the 28 U.S.C. §1331 jurisdictional question. Id. at 58a n. 5. However, he asserted that the *Rooker-Feldman* doctrine was inapplicable. (*Id.*) (citations omitted).

SUMMARY OF ARGUMENT

1. Petitioners allege that the federal district courts have jurisdiction under 28 U.S.C. §1331.[9] However, Verizon's complaint does not meet the requirements necessary to

[9] Section 1331 provides in pertinent part, that "[t]he district courts shall have original jurisdictional of all civil actions arising under the . . . laws . . . of the United States."

establish jurisdiction under §1331.[10] The district courts have that jurisdiction which Congress grants through statute. Because federal question jurisdiction ultimately depends on an act of Congress, the scope of the district courts' jurisdiction depends on the Congressional intent manifested in the statute at issue.

An analysis of the four factors established in *Cort v. Ash,* 422 U.S. 66 (1975), can only result in the conclusion that a private right of action may not be inferred from the 1996 Act. Neither the language of the 1996 Act nor its legislative history indicates that Congress intended to create a private cause of action.

2. Furthermore, §1331 jurisdiction may be preempted by a doctrine which requires jurisdiction to reside elsewhere. Congress has not abrogated the State commission's sovereign immunity pursuant to §1331. The Supreme Court has expressly held that §1331 does not suffice to abrogate immunity for all federal questions. *Blatchford v. Noatak,* 501 U.S. 775, 786 (1991). In light of this statement, no reasonable argument could be made that §1331 constitutes an abrogation of state immunity.

3. Moreover, State commissions cannot be found to have constructively waived their sovereign immunity by implementing the provisions of the 1996 Act. The Supreme Court repudiated the doctrine of constructive waiver in *College Savings Bank v. Fla. Prepaid Postsecondary Education Expense Board,* 527 U.S. 666 (1999). The

[10] The party seeking the federal forum must establish the basis for the court's jurisdiction. In this instance, Petitioners have failed to allege that federal law creates any cause of action. Jurisdiction may not be sustained on a theory that the plaintiff does not advance. *Healy v. SeaGull Specialty Co.,* 237 U.S. 479, 480 (1915).

Maryland Commission cannot be found to have waived its sovereign immunity by implementing the requirements of the 1996 Act. Congress has not unequivocally provided that the Maryland Commission waives its sovereign immunity when implementing the 1996 Act.

4. Similarly, the *Ex parte Young* doctrine is inapplicable to this situation. This Court should find that the 1996 Act is a detailed remedial scheme. Thus, pursuant to the restrictions placed on the *Ex parte Young* exception in *Seminole,* the doctrine cannot be used to avoid the Eleventh Amendment bar. Furthermore, the 1996 Act clearly indicates that Congress contemplated that the **State** would be the respondent.

5. Finally, this Court should apply the *Rooker-Feldman* doctrine and find that the lower federal courts lack jurisdiction over this suit. The Maryland Commission performs a judicial act when implementing or enforcing the 1996 Act. Important concepts of federalism require that the federal district court refrain from taking jurisdiction over this case.

ARGUMENT

I. THE 1996 ACT DOES NOT CREATE A PRIVATE CAUSE OF ACTION

The district courts have only that jurisdiction which Congress grants through statute. Even though Congress has conferred general federal question jurisdiction on the district courts under 28 U.S.C. §1331 in terms similar to the constitutional provision, the term "arising under" in the statute is narrower than the similarly stated constitutional power. *Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S.

480, 495 (1983). Because federal question jurisdiction ultimately depends on an act of Congress, the scope of the district courts' jurisdiction depends on the Congressional intent manifested in the statute at issue. As this Court has found, "the source of plaintiff's rights must be found, if at all, in the substantive provisions of the . . . Act which they seek to enforce, not in the jurisdictional provisions." *Touche Ross & Co. v. Redington,* 442 U.S. 560, 577, (1979).

There are two tests under which an action may present a federal question. The first asks whether federal law creates the cause of action. If so, federal question jurisdiction exits. *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916). If state law creates the cause of action, the second test asks whether that cause of action poses a substantial federal question. *Smith v. Kansas City Title & Trust Co.,* 255 U.S. 180, 201 (1921).[11]

Courts begin with the presumption that if a statute does not expressly create a private cause of action, one does not exist. *See, Louisiana Landmarks Soc. Inc. v. City of New Orleans,* 85 F.3d 1119, 1123 (5th Cir. 1996). By now, Congress is well aware of this presumption and how to provide private remedies. *See, Touche,* 442 U.S. at 572.

Appellants arguments rest on the faulty assumption that the existence of a federal statute automatically gives rise to §1331 jurisdiction.[12] However, this Court has held that

[11] Since Verizon raised no state law claims, this second test is inapplicable to this appeal.

[12] Petitioners contend that if Congress had intended to restrict the jurisdiction of the federal district courts, it would have expressly precluded jurisdiction in the 1996 Act. This argument ignores the fact that federal district courts are courts of **limited** jurisdiction and only possess that jurisdiction which Congress expressly grants. Thus, "preclusive language" is unnecessary to establish that federal courts do not have jurisdiction.

"the fact a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." *Cannon University of Chicago,* 441 U.S. 677, 688 (1979). Instead, a court must carefully analyze the four factors that *Cort v. Ash*, 422 U.S. 66 (1975), identifies as indicative of Congressional intent to create a private right of action.

Under the settled framework for evaluating whether a private cause of action may be inferred from a statute, the factors considered include whether the plaintiff is part of the class for whose especial benefit the statute was passed; whether the indicia of legislative intent reveals a congressional purpose to provide a private cause of action or deny one; whether it is consistent with the underlying legislative scheme to imply such a remedy; and whether the cause of action is one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law. *Cort v. Ash*, 422 U.S. at 78 (1975). (internal citations and quotations omitted).

Unless Congressional intent to create a private cause of action can be inferred from the language of the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist. *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 94 (1981). Whether Congress has created an enforceable right is determined by its intent. *Smith v. Kirk*, 821 F.2d 980, 982 (4th Cir. 1987). Neither the language of the 1996 Act nor its legislative history indicates that Congress intended to create a private cause of action. [13]

[13] The argument presented by the United States regarding the legislative history of the 1996 Act fails to cite any legislative history to support its bald assertions. (U.S. Brief at 23-24)

The legislative history of the 1996 Act establishes that Verizon is not a part of the class for whose special benefit the statute was enacted. The Act itself expresses Congress' intent "to promote competition and reduce regulation in order to secure lower prices and higher quality services for ***American telecommunications consumers*** and encourage the rapid deployment of new telecommunications technologies." Telecommunications Act of 1996, Pub. L. No. 104-104, purpose statement, 110 Stat. 56, 56 (1996). (Emphasis added) In its report concerning the legislation, Congress specifically stated that:

> . . . in order to secure lower prices and higher quality services for **American telecommunications consumers** . . . the result will be lower prices to **consumers and businesses,** . . . a competitive edge for **American businesses**, . . . indeed, the enormous **benefits to American businesses and consumers** from lifting the shackles of monopoly regulation . . .

H.R. Rep. No. 204, 104th Cong., 2nd Sess. 47/8 (March 1996) (emphasis added). Thus, it is clear that the 1996 Act was enacted to benefit consumers, not ILECs such as Verizon.

Furthermore, an examination of the legislative history and statutory scheme presents no indication that Congress intended to create a private cause of action. The only express grant of federal jurisdiction in the 1996 Act, §252(e)(6),[14] is limited.

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[14] Section 252(e)(6) provides, in pertinent part, "In any case in which a State Commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate

Under §252(e)(6), a district court's review of a State commission's approval or rejection of an interconnection agreement is limited to whether the agreement meets the requirements of §§251 and 252. It does not by its terms cover other aspects of a State commission's decision, such as consistency with State law, or matters addressed in §253. *See*, e.g. *Puerto Rico Telephone Company v. Telecommunications Regulatory Board,* 189 F 3d. 1 (1st Cir. 1999). Thus, §252(e)(6) is a very limited jurisdictional provision.[15]

This Court has held that the express provision by Congress of one method of enforcing a substantive rule suggests that Congress intended to preclude others. *Northwest Airlines v. Transport Workers,* 451 U.S. at 93-94 (1981). *See also, Nat'l RR Passenger Corp. v. Nat'l Assoc. of RR Passengers,* 414 U.S. 453, 455 (1978) ("when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies."); *Northwest Airlines Inc.,* 451 U.S. at 97. ("The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement.") Petitioners ignore this rule of statutory construction. The Fourth Circuit's conclusion that §252(e)(6) should be interpreted to curtail jurisdiction under §1331 is the correct application of this rule.

Federal district court to determine whether the agreement or statement meets the requirements of Section 251 of this title and this section."

[15] The Court should note that State court review is more efficient since State courts would have jurisdiction over the entire matter, including questions of State law. *See*, *Pennhurst v. Halderman,* 465 U.S. 89, 117 (1984).

Aside from the narrow remedy contained in §252(e)(6),[16] the 1996 Act also explicitly provides for federal court jurisdiction in two other sections. Section 274 creates federal jurisdiction in the electronic publishing area and Section 207 creates the same jurisdiction over interstate communications disputes. That Congress expressly provided for a private cause of action in these sections is evidence that when Congress wished to provide a private remedy, it knew how to do so and did so expressly. *Touche*, 442 U.S. at 572.

The conclusion that Congress did not intend to create a private cause of action is further supported by the fact that Congress considered, but failed to include, a private right of action in the 1996 Act for violations of an interconnection agreement. Section 257 of the Senate Bill expressly provided for a private right of action. S. Rep. No. 104-23, 104th Cong., 1st Sess., at 104-05. However, this provision was not enacted in the final legislation. Congress' express grant of federal rights of action in three sections of the 1996 Act while deleting a similar provision from the Senate Bill, demonstrates that Congress did not intend to create an implied cause of action.

Consideration of the first two *Cort* factors is dispositive. The language of the statute and its legislative history do not suggest that the Act was intended to create federal rights for the benefit of a class of persons but rather was intended to benefit the public at large through a regulatory scheme to be administered in large part by the States. *See, California v. Sierra Club*, 451 U.S. 287, 298 (1981). In *California,* this Court found that statutes which

[16] The district courts have construed §252(e)(6) narrowly. *See, e.g. Citizen's Utility Ratepayers Board v. McKee,* 946 F.Supp. 89 (D. Kan. 1996) (Plaintiff is not an aggrieved party under §252(e)(6); only the interconnecting service provider or affected local exchange carrier has standing pursuant to this provision.)

focus on the person regulated rather than the individuals protected create "no implication of an intent to confer rights on a particular class of persons." *Id. at 294. See, also, T.I.M.E., Inc. v. United States,* 359 U.S. 464 (1959); *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.,* 341 U.S. 246 (1951) (Court is reluctant to imply causes of action under statutes that create duties on the part of persons for the benefit of the public at large). Nor is there any evidence that Congress anticipated that there would be a private remedy. In short, Congress did not intend a private federal remedy for violations of the statute that it enacted. Thus, the federal district court cannot exercise federal question jurisdiction and provide remedies for violation of the 1996 Act because assuming such jurisdiction is contrary to Congressional intent.[17]

This being the case, it is unnecessary to inquire further to determine whether the purpose of the Statute would be advanced by the judicial implication of a private action or whether such a remedy is traditionally relegated to state law. This Court has held that the federal judiciary will not engraft a remedy on a statute that Congress did not intend to provide. *California v. Sierra Club,* 451 U.S. at 297. These factors are only of relevance if the first two factors give indication of a Congressional intent to create the remedy. *Id., citing, Touche,* 442 U.S. at 574-576.

[17] The United States misconstrues the Maryland Commission's argument. The MDPSC contends that §252(e)(6) does not grant jurisdiction over enforcement orders. However, contrary to the United States misinterpretation (United State Brief at pg 22 n. 5), the MDPSC never argued that §252(e)(6) "revoked" federal court jurisdiction. The Maryland Commission correctly contends that the inclusion of this narrow remedy means that Congress did not intend for broader private causes of action to be implied. Not only are these contentions not in conflict, both are correct.

However, with regard to whether the remedy is traditionally relegated to State law, in this instance it clearly was traditionally the province of the State. As noted by Justice Thomas, since the invention of the telephone the States have been exclusively responsible for regulatory intrastate telephone service. *AT&T Corp., v. Iowa Util. Bd.*, 525 U.S. 366, 403 (1999) (Thomas, J., joined by Rehnquist, C.J. & Breyer, J., concurring in part and dissenting in part). The Maryland Commission was charged with regulating telephone service in 1910. Maryland Chp. Laws, Chp. 180 (1910). When Congress entered the telecommunications field by enacting the Mann-Elkins Act (Ch. 301 §7, 36 Sta. 544-45 (1910)), it did not preempt the States' regulation of intrastate phone service *AT&T,* 525 U.S. at 403. (Thomas, J.) This jurisdictional separation remained unaltered until the passage of the 1996 Act.

During this period, States created extensive regulatory schemes implementing their authority over intrastate telephone service. In all instances, these regulatory schemes included the creation of administrative bodies as well as methods for appealing the decisions of those bodies. *See, e.g.*, Annotated Code of Maryland, *PUC Article,* §§3-202, 3-204, 3-209. Even after the passage of the 1996 Act, primary responsibility for overseeing the implementation of §§251 and 252 remains with State administrative agencies.

The conclusion that the 1996 Act does not create a private cause of action negates Verizon's claim of federal subject matter jurisdiction.[18] In the absence of a federal statutory cause of action, declaratory relief is available only

[18] This conclusion is in keeping with the Supreme Court's long-standing presumption against finding private actions under the Federal Communications Act of 1934. *See, Scripps-Howard Radio, Inc. v. Federal Communications Comm'n,* 316 U.S. 4, 14 (1942). (Act of 1934 "did not create new private rights").

when a federal statute totally precludes State regulation of the matter being litigated. In other words, the federal statute must have entirely occupied the field, preventing any State regulation of matters within the scope of the federal statute. *Western Airlines, Inc. v. Port Authority of New York and New Jersey*, 817 F.2d 222, 225-26 (2nd Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988). *See also, Burgio and Campofelice, Inc. v. NYS Dept. of Labor*, 107 F.3d 1000, 1007 (2nd Cir. 1997). A preemption cause of action for declaratory relief is not an alternative means for enforcing the substantive provisions of the federal statute. *Western Air Lines v. Port Authority of New York & New Jersey*, 817 F.2d at 225-26.

The District Court of California reached the same conclusion concerning a challenge to §254 of the 1996 Act. In this case, the California Public Utilities Commission ("CPUC") adopted two end-user surcharges to finance intrastate universal telephone service programs. The Utility Reform Network challenged this decision as being preempted by the Telecommunications Act of 1996. The California District Court found that an individual may challenge State regulations despite the lack of statutory cause of action only when a federal statute forbids State regulation of the area that the State is purporting to regulate. In other words, only when the federal statute had "occupied the field" thereby preventing any State regulation of matters falling within the scope of the federal statute. *Turn v. CPUC*, 26 F. Supp. 2nd 1208, 1213 (N.D. Cal. 1998) The California court specifically noted that it was "not aware of any authority holding that a preemption cause of action may serve as a vehicle to challenge an otherwise permissible State regulation simply because it allegedly violates a substantive provision of a federal statute." *Id.* The Court concluded that the plaintiff could not challenge the CPUC's compliance with

the substantive provisions of the 1996 Act by means of a preemption cause of action. *Id.* at 1213-1214.

Several other courts also have found that jurisdiction is limited to the 1996 Act. In *Indiana Bell v. McCarty,* 30 F. Supp. 2d. 1100, 1102 (S.D. Ind. 1998), the district court explained that where Congress provides a means to seek review of an agency determination, alternative means of review are inapplicable. *Accord, see Michigan Bell v. MFS Intelenet,* 16 F. Supp. 2d. 710 (W.D. Mich. 1998); *GTE Northwest v. Nelson,* 969 F. Supp. 654, 656 (W.D. Wash. 1997). The conclusion of these courts is in keeping with the Supreme Court's decision in *Seminole Tribe v. Florida,* 517 U.S. 44 (1996), which stands for the proposition that Congress' particular choice of remedies must be respected. Respect for Congressional intent means that generalized statutes cannot be used in place of the tailored ones Congress created.

No reasonable argument could be made contending that the 1996 Act entirely preempts State regulation of local exchange service or local exchange carriers. Among a variety of other things, §252 requires a State commission to determine rates in the context of an arbitration. *See, e.g.*, §§251(c)(4) and (6); 251(d)(3); 251(f), 252, 253(b) and (f), 254 and 261(c).

Contrary to Petitioners' assertions, the Fourth Circuit's interpretation and reliance on *Jackson Transit Authority v. Local Division 1285,* 457 U.S. 15 (1982), was correct. In *Jackson*, the Court found that the mandatory incorporation of federal standards into a contract did not necessarily create federal question jurisdiction in an action based on a breach of those standards. *Jackson* involved a suit by a union alleging breach of a "§13(c) agreement", which preserved transit workers preexisting rights. This

guarantee was required by §13(c) of the Urban Mass Transportation Act of 1964, 41 U.S.C. §1609(c). The union argued that because the contract rights were guaranteed federal law, its complaint stated claims arising under federal law. The Court rejected that argument and found that Congress did not intend such contract actions to set forth federal claims. *Id.* at 21.[19]

Ironically, WorldCom's argument actually supports the Maryland Commission's position. WorldCom agrees that it is a question of State law "whether the interconnection agreement includes a dynamic incorporation of statutory interpretation." WorldCom Brief at 20. (citing Fourth Circuit Opinion at 27a). WorldCom also agrees with the Fourth Circuit's conclusion that merely because Congress required parties to enter into a contract does not render interpretation of that contract a federal question. *Id.* (citing Fourth Circuit Opinion at 49a) As stated by WorldCom, "nothing in the Act suggests that Congress intended to transform every question regarding the meaning of an interconnection agreement into a federal question." *Id.*

However, WorldCom misreads *Jackson* when it states that the Court found that federal district court had jurisdiction over the union's complaint. To the contrary, the *Jackson* Court merely found that the federal district court had jurisdiction to determine whether the union had a cause of action. 457 U.S. at 21 n.6. The *Jackson* Court found that

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[19] A few years later, the Fifth Circuit also found that a contract incorporating a federal regulatory standard does not give rise to federal question jurisdiction. *Oliver v. Trunkline Gas Co.,* 796 F.2d 86, 89 (5th Cir. 1986). ("We are aware of no cases in which any court . . . has held that a private contract can give rise to federal-question jurisdiction simply by incorporating some federal regulatory standard that would not be binding on the parties by its own force.")

the union had no cause of action, thus the federal court had no jurisdiction to entertain the union's complaint.

Applying the rationale of *Jackson* to the current situation, the Court should find that the interconnection agreement does not create federal question jurisdiction. The rights of both the ILEC and the CLEC are created by their contract, which may incorporate the federal standards. The 1996 Act expressly provides that the ILEC may negotiate an interconnection agreement without regard to the standards in §§251 (b) and (c). §252(a). Thus, any federal standards incorporated into a negotiated interconnection agreement were included at the choice of the parties. The parties, by their own choices, cannot create federal question jurisdiction.

Verizon's argument analogizing interconnection agreements to federal tariffs is only half correct. These agreements are analogous to tariffs, but to *State* tariffs not federal tariffs. Verizon's contention ignores that the State commission establishes the rates, provides the schedule for implementation and ensures that the rates and conditions meet the requirements of §251 and §252(c). The State commission is required to determine the wholesale prices for telecommunications services §252(d)(3). The State commission also may establish or enforce other requirements of State law in its review of that agreement §252(e)(3). The approved interconnection agreement is filed with the State commission, which has the obligation to make each agreement available for public inspection §252(h). Furthermore, Maryland, like other States, includes arbitrated rates in the Statement of Generally Available Terms ("SGAT"), which is a tariff filing available to any CLEC. See, §252(f). Thus, the interconnection agreements are analogous to State tariffs, not federal tariffs. The State commission exercises full responsibility for the terms and

conditions, even the responsibility of making those terms available to others.[20]

Verizon's contention that Maryland lacked authority under State law to hear complaints arising from interconnection agreements is simply incorrect. The terms of an interconnection agreement are established pursuant to State Commission order. The agreement is approved by State Commission order. Thus, a violation of any agreement is a violation of a Commission order subject to the full State enforcement powers of the Maryland Commission.

Petitioners have set up a strawman argument in an attempt to distract the Court from the real issue in this case. Contrary to Petitioners' assertions, the question in this proceeding is not whether anything in §252 withdraws federal question jurisdiction. This argument ignores the ample precedent of this Court establishing that federal district courts are courts of limited jurisdiction and thus only have that jurisdiction expressly granted by Congress. Petitioners' argument turns this proposition on its head and requires the Court to make the unprecedented finding that under §1331 federal district courts can hear virtually any claim unless Congress has expressly barred the court from hearing that claim.

The cases cited by Petitioners do not support the proposition they are espousing. This is not surprising given that the Petitioners present such novel view of the law. None of the authorities provided by the Petitioners support the concept that federal district courts can exercise §1331 jurisdiction in this instance.

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[20] The authorities cited by Verizon are inapposite because all involved tariffs approved by and filed with federal agencies.

The main authority cited by Verizon actually supports the Maryland Commission's position. In *International Association of Machinists, AFL-CIO v. Central Airlines, Inc.*, 372 U.S. 682 (1963), the Court examined the act at issue, its history and purposes. Based on this analysis, the Court found that the plaintiffs had a cause of action and the federal district court could exercise jurisdiction.[21] Thus, though required by federal law, the contract disputes did not "automatically" come within the federal district courts' jurisdiction.

Petitioners other authorities are simply inapposite. For example, Verizon cite *Bowen v. Michigan Academy of Family Physicians,* 476 U.S. 667 (1986) and *Stark v. Wickard,* 321 U.S. 288 (1944) to support its claim of jurisdiction. However, these cases involved federal agencies arguing that specific decisions were totally shielded from any court review. In contrast, the Maryland Commission contends that it's order is subject to review, but only by a State court. *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991) is similarly inapposite. *McNary* involved the specific issue of whether plaintiffs claims came within a specific statutory provision barring jurisdiction in certain circumstances. The sole issue was the applicability of this bar, the parties having conceded that in the absence of this statutory provision the plaintiffs had a cause of action.

WorldCom relies on *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 583 (1998). In *Steel Co.* the statute at issue expressly provided for a citizen suit. Thus, plaintiffs did not have to establish a general cause of action, the question was whether this provision allowed for suit based on a historical violation. There was no question that the

[21] This Court should note that the *Central Airlines* decision was rendered prior to the Court's decision in *Cort v. Ash*, *supra*, which established the four factors used to determine whether a private cause of action exists.

statute authorized the plaintiffs to sue.[22] Finally, the Petitioners inappropriately rely on a footnote in *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983). *Shaw* however involved a State regulation which was allegedly preempted by federal law. In the present instance the Maryland Commission's decision cannot "conflict" with the *ISP* Order. The Maryland Order expressly interpreted and applied the FCC decision. While one may argue that this interpretation is erroneous, to claim that the Maryland Order "conflicts with" or is "preempted by" the FCC Order is simply a misnomer. Since the Maryland Commission did not apply any State law which may be said to be preempted by a federal law, Petitioners' reliance on *Shaw* is misplaced.

Contrary to Petitioners' assertions, the federal district courts enjoyed no "preexisting jurisdiction" under the 1996 Act. Section 601 of the 1996 Act provides that the Act shall not be construed to modify or supercede Federal law. Federal law includes the requirement that plaintiffs establish a cause of action, either express or implied, under §1331 in order to establish jurisdiction. Petitioners' novel arguments regarding preexisting jurisdiction and express statutory bar should be rejected by this Court.

This Court should find that the 1996 Act does not create a private cause of action, nor does it "occupy the field," thereby preventing any state regulation of matters falling within the scope of the federal statute. Given these conclusions, the Court should hold that the district court did not have jurisdiction pursuant to 28 U.S.C. §1331.

[22] The main question resolved by the Court was whether a court must resolve the Article III standing issue prior to resolving the statutory jurisdictional question.

II. THE ELEVENTH AMENDMENT MANDATES THAT THIS CASE BE DISMISSED.

A. The Maryland Commission Has Not Waived Its Sovereign Immunity.

Generally, the Eleventh Amendment divests federal courts of jurisdiction over suits brought by private parties against a state. *See, Marie O. v. Edgar*, 131 F.3d 610, 614 (7th Cir. 1997). The Eleventh Amendment presupposes that each state is a sovereign entity in the federal system and that "[i]t is inherent in the nature of sovereignty not to be amendable to the suit of an individual without [a state's] consent." *Hans v. Louisiana*, 134 U.S. 1 (1890). This Amendment has been interpreted to bar federal jurisdiction over suits against a state arising under the Constitution or Laws of the United States, whether those suits are brought by citizens of another state or by the state's own citizens. *Id.* The Eleventh Amendment imposes a constitutional limitation on the jurisdiction of Article III courts. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 98 (1984). Eleventh Amendment immunity is similarly applicable to the Commission as an arm of the State of Maryland. *See, Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 142-46 (1993).

Previously, the Supreme Court identified three instances in which the Eleventh Amendment does not deprive an Article III court of jurisdiction to entertain allegations of state governmental wrongdoing. First, Congress may abrogate the States' Eleventh Amendment immunity "by making its intention unmistakably clear" in the text of a federal statute enacted pursuant to a constitutional provision that empowers Congress with abrogation rights. *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989). Second, a state may waive Eleventh Amendment immunity *Parden v.*

Terminal Ry. Co., 377 U.S. 184 (1964). Finally, a court may consider a suit against a state official to enjoin a non-discretionary violation of federal law. *Ex parte Young*, 209 U.S. at 159-60.

This Court has repeatedly held that the Congressional power to abrogate the States' sovereign immunity can only be exercised by a clear legislative statement. *Dellmuth v. Muth*, 491 U.S. at 227-228 (1989). In *Blatchford v. Noatak*, 501 U.S. 775 (1991), the Supreme Court expressly found that §1331 does not suffice to abrogate immunity for all federal questions. *Id.* at 78. As noted by the *Blatchford* Court, "the fact that Congress granted *jurisdiction* to hear a claim does not suffice to show Congress has abrogated all *defenses* to that claims." *Id.* at 786 n. 4 (Emphasis in original).

This Court's recent *Seminole* decision places limitations on a party's ability to bypass a State's immunity from suit in federal court. The decision restricts the power of Congress to abrogate state immunity. The decision also narrows the scope of the *Ex parte Young* exception to Eleventh Amendment immunity. Finally, *Seminole* arguably left open the issue of whether a State may impliedly waive its immunity to suit in federal court.

However, in *College Savings*, the Supreme Court repudiated the doctrine of constructive waiver. The Court found that the "constructive waiver experiment was ill conceived" and it overruled "whatever may remain of *Parden*," that doctrine's seminal decision.

Petitioners below maintained that constructive waiver is possible when Congress provides unambiguously that a State will be subject to suit if it engages in certain federally regulated conduct and the State voluntarily engages in that

conduct. The Supreme Court disagreed, finding that even an unambiguous statement of Congressional intent cannot be reconciled with the requirement that a State's waiver of sovereign immunity be unequivocal. *College Savings*, 527 U.S. at 680. (Citations omitted). Thus, a state does not consent to suit in Federal court simply by engaging in federally regulated conduct even where Congress has provided that the State will be subject to private suit if it engages in that conduct. *Id.* at 680-681. *See also, Fla. Dept. of Health v. Fla. Nursing Home Asso.*, 450 U.S. 147, 150 (1981) (State's participation or agreement to administer a federal program does not constitute a waiver of Eleventh Amendment immunity).

This Court should determine that the Maryland Commission cannot be found to have waived its sovereign immunity for two reasons. First, Congress lacks the constitutional authority, pursuant to the Commerce Clause, to condition the State's participation on that state's waiver of its Eleventh Amendment immunity. Second, the 1996 Act is neither a "gift" nor a "gratuity".

1) Congress Lacks the Constitutional Authority to Condition Grants Under the Commerce Clause.

In light of *Seminole* and *College Savings*, even assuming Congress expressly conditioned state participation in the regulatory scheme of the 1996 Act on waiver of the State's immunity to suit in federal court, Congress nevertheless was without authority to do so under the Commerce Clause. Art. I §8, Cl. 3. Any argument based on constructive waiver presupposes that Congress has the authority pursuant to Article I of the Constitution to force a state to waive its Eleventh Amendment immunity as a condition of participating in a field subject to federal

regulation. However, the *Seminole* Court stated in no uncertain terms, that "the Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed on federal jurisdiction." 517 U.S. at 72-73. Thus, as noted by the *College Savings* Court, the *Seminole* decision "expressly repudiates" the proposition that Congress has authority, under the Commerce Clause, to expand Federal jurisdiction. *College Savings,* 527 U.S. at 683. Therefore, allowing federal courts to apply the doctrine of constructive waiver based on Congress' commerce powers would directly contravene the Supreme Court's express repudiation of this doctrine in *Seminole*.

The *Seminole* Court found that Congress cannot abrogate a state's Eleventh Amendment immunity pursuant to the Commerce Clause. 517 U.S. at 69. More specifically, the *Seminole* Court stated that "[e]ven when the Constitution rests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents Congressional authorization of suits by private parties against unconsenting states." 517 U.S. at 72. The impact of *Seminole's* conclusion was explicitly stated by the *College Savings Court*, which found that "[r]ecognizing a congressional power to extract constructive waivers of sovereign immunity through the exercise of Article I powers would also, as a practical matter, permit Congress to circumvent the anti-abrogation holding of *Seminole Tribe*." 527 U.S. at 683.

Therefore, the conclusion that Congress could have excluded states from any role in the 1996 Act is irrelevant to determining whether a state has constructively waived its immunity. Under analysis, Congress would be permitted to do indirectly what it cannot do directly, namely, abrogate a state's immunity pursuant to the Commerce Clause by

making abrogation a "condition" of participation. See, eg. *Abril v. Virginia*, 145 F.3d 182, 190 n. 15 (4th Cir. 1998).

Since Congress has no authority under its Article I Commerce Clause powers to abrogate state sovereign immunity, *Seminole* 517 U.S. at 71-72, it follows the Congress may ***not*** make the waiver of sovereign immunity a condition to the state's action in a field that Congress has authority to regulate under the Commerce Clause. In the present case, where Congress is not empowered to abrogate the Eleventh Amendment immunity conferred upon the Commission directly, likewise it cannot do so indirectly through principles of constructive waiver. The Maryland Commission has not waived such protection by voluntarily participating in the regulation of telecommunications. The telecommunications industry indisputably involves a quintessential state interest - the provision of telecommunications services to the citizenry at competitive rates - protection of which Congress cannot condition on a state's waiver of vital state rights.

This Court should find that Congress lacks the constitutional authority to require states to waive their Eleventh Amendment immunity when it enacts legislation pursuant to the Commerce Clause. Since the Supreme Court has previously ruled that Congress cannot abrogate States' immunity through the Commerce Clause, it would be illogical to permit Congress to condition any "gift" on accepting abrogation of Eleventh Amendment immunity pursuant to this very same constitutional provision.

2) The 1996 Act is Neither a Gratuity Nor a Gift to the States from Congress.

In a strained effort to avoid the obvious impact of *College Savings*, Petitioners below contended that the 1996

Act is a "benefit" from Congress to the States and that, therefore, Congress is entitled to place conditions on the acceptance of that gift. This Court should reject this distortion of the *College Savings* analysis.

The threshold question is whether Congress had "unequivocally" expressed its intent that waiver of Eleventh Amendment immunity was a condition of the State's participation in the 1996 Act. The Supreme Court has required "an unequivocal expression of congressional intent" to obtain an Eleventh Amendment waiver from states. *Atascodero*, 473 U.S. 234, 238-40 (1985).[23] Congress must state the condition unambiguously. *Pennhurst State Sch. & Hosp. v. Halderman,* 451 U.S. 1, 17 (1981). Congress must speak with a clear voice so that the States many exercise their choice to waive their immunity "knowingly cognizant of the consequences of their participation." *Id.*

Plainly, §1331 does not unequivocally express Congressional intent that a State waive its sovereign immunity when implementing the 1996 Act. As noted earlier, this Court has held that §1331 does not abrogate a States' Eleventh Amendment immunity. *Blatchford, supra.* This same provision certainly cannot be viewed as unambiguously requiring that States waive their sovereign immunity as a condition of participating in the regulatory scheme. In short, §1331 lacks the clear statement necessary so that a state participating in the 1996 Act's implementation requirements can choose to participate or not, fully cognizant

[23] In *Atascadero,* the Court held that a general jurisdiction provision "is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment" and that it "likewise falls far short of manifesting a clear intent to condition a clear intend to condition participation in the program funded under the Act on a state's consent to waive its constitutional immunity. *Id.* at 246.

that Congress intended that this participation would subject the State to suit in federal district court pursuant to §1331.

The State commissions are merely agreeing to obey federal laws in participating in a federal program. Agreeing to obey federal law does not constitute an agreement to be sued in federal court. Prior to the enactment of the 1996 Act, State commissions could and did resolve disputes between ILECs and CLECs. A brief review of the regulatory changes which occurred in Maryland prior to the 1996 Act will demonstrate this fact.

Maryland began opening the local telephone service market to competition in 1993. On July 26, 1993, MFS applied for authority to become a local exchange service provider in the areas of Maryland served by Verizon. In addition, MFS petitioned the Commission to establish specific policies and requirements for the interconnection of competing local exchange networks. In setting the application for hearing, the Commission concluded that the proceeding should serve to establish generic policies and requirements for telecommunications carriers.

In Phase I, the Commission approved the unbundling of local exchange links and ports.[24] The Commission also granted MFS authority to provide telephone services in Maryland. Verizon was required to provide for interconnection with MFS. An interim interconnection rate also was established for local call termination on Verizon's network. In addition, MFS was permitted to file a tariff, with cost support, to establish a charge for the termination of calls on its own network. In Phase II, the Commission set

[24] *Re MFS Intelenet of Maryland, Inc.*, 85 Md. PSC 38 (April 25, 1994).

the rates, term and conditions for interconnection between the carriers.[25]

Maryland's experience with opening the local market to competition demonstrates that the 1996 Act was not a "benefit" but an unwarranted intrusion. Maryland's only "gains" under the 1996 Act were a loss of autonomy. Prior to the 1996 Act, Maryland had sole authority over its local exchange market. After the Congressional enactment, Maryland is now forced to share that authority with the FCC and can even be preempted by that agency. Certainly no reasonable person would interpret this outcome as a "benefit" or "gift" to Maryland. In actuality, all the benefits flowed to the FCC, which is permitted to usurp the State's traditional regulatory authority, and utilize State resources in implementing the 1996 Act.

Furthermore, participation by the States in the 1996 Act's regulatory scheme was not voluntary. Regulation of local exchange carriers traditionally has been within the police powers of the State. The telecommunications industry indisputably involves a quintessential "state interest" - the provision of telecommunications services to the citizenry at competitive rates-protection of which Congress cannot condition on a State's waiver of vital rights. Upon passage of the 1996 Act, a State was forced to either abide by the federal regulations or cede its power to regulate to the FCC (a classic Hobson's choice). The option of either consenting to federal regulation and waiving immunity or losing the previously held power to regulate a local exchange carrier is not a choice that any court should perceive as voluntary.

The linchpin of the contention that the 1996 Act constitutes a "gift" is §252(e)(5). The Petitioners argued

[25] *Re MFS Intelenet of Maryland, Inc.*, Phase II, 86 Md. PSC 467, 470-71 (Dec. 28, 1995).

below that this provision rendered the state's participation in the 1996 Act voluntary because the FCC would take over the responsibilities of any state who "chooses" not to participate. However, Petitioners interpretation of this section is overly broad and contrary to the plain meaning of that provision. Section 252(e)(5) states "if a State commission fails to act to carry out its responsibility under this section **in any proceeding or other matter** . . . the [FCC] shall issue an order preempting the State commission's jurisdiction **of that proceeding or matter** . . . and shall assume the responsibility of the State commission . . . **with respect to the proceeding or matter** . . . . "(emphasis added).

Clearly, this provision envisions the FCC assuming jurisdiction over discrete proceedings or matters, not taking over wholesale responsibility for telecommunications regulation in state. This conclusion is supported by the Joint Committee of Conference Report which described the Senate provision as requiring that the FCC "shall assume the responsibilities of the State in the **applicable proceeding or matter**." H.R. Conf. Rep. No. 104-458 (1996), reprinted in 1996 U.S.C.C.A.N. 124 (emphasis added) Congress could not have contemplated the FCC taking full responsibility for regulatory local service in the States. The reason the States are included in the 1996 Act is not "in the spirit of federalism" but because the federal government is incapable of regulating such a vast industry on its own. Essentially, Congress is using the States to implement a program that the federal government would be incapable of carrying out on its own.

More critically, the FCC severely undermined any "voluntary" aspect of a State's "opting in" by stating explicitly that, in assuming jurisdiction over a matter, "it shall not be bound by State laws and standards that would

have applied to the State commission in such proceeding or matter." 47 CFR §51.807(b). So much for "genuine choice."

Finally, several federal courts have held that they will not review interconnection agreements for violations of state law. *See, e.g., Illinois Bell v. WorldCom*, 179 F.3d 566, 571 (7th Cir. 1999). Thus, if a State commission had "opted out" of the 1996 Act, State law requirements would not even receive any consideration and parties who operate in violation of State law could do so with impunity.

The above are not "genuine choices" that fall within those limits articulated for a preemptible field in *FERC v. Mississippi*, 456 U.S. 742 (1982). The 1996 Act passed the "point of coercion" because the effect of Maryland's refusal to waive its immunity is the exclusion of the State from an otherwise lawful activity. *See, College Savings,* 527 U.S. at 687. Under the 1996 Act, a State has the choice of seeing its commission frozen out of effective enforcement of state-related service and interconnection issues, as well as federal matters under §§251 and 252, **or** the State is stripped of its immunity from federal judicial review. The States are thus denied that "dignity and respect" to which a sovereign State is entitled.

There is no arguable basis to conclude that the State's continued regulation of local telephone carriers is a "benefit" from Congress, which justifies constructive waiver of Eleventh Amendment immunity. This Court should hold that abrogation of Eleventh Amendment immunity as the price of "opting into" the scheme created in §252 is an invalid option in light of *Seminole* and *College Savings.* Therefore, the Commission's Eleventh Amendment immunity was not waived through its participation in §252 arbitration proceedings. The 1996 Act's requirement of federal district court review is unconstitutional.

B. This Proceeding Does Not Meet the Requirements of the *Ex parte Young* Exception

Verizon attempted to avoid the bar of Eleventh Amendment sovereign immunity by naming the Commission members individually in their official capacities. *See, Ex parte Young*, 209 U.S. 123 (1908). *Seminole* represents the first Supreme Court decision since *Ex parte Young* to hold that the Eleventh Amendment bars an action against a State official for purely prospective relief to prevent ongoing violations of federal law.

Relief under *Ex parte Young* may be foreclosed if the statute in question provides "a detailed remedial scheme," if that remedy is "significantly more limited than . . . the liability upon the state officer under *Ex parte Young"* and if Congress did not to "authorize federal jurisdiction under *Ex parte Young* over a causes of action with a limited remedial scheme." *Seminole,* 517 U.S. 44, 74-75 (1996).

The *Seminole* Court found that "where Congress has prescribed a detailed remedial scheme for the enforcement against a state of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*." *Seminole*, 517 U.S. at 74. This Court should find that the 1996 Act constitutes a comprehensive statutory scheme and thus the *Ex parte Young* doctrine does not apply.

In *Seminole*, after rejecting the tribe's abrogation argument, the Court turned to the tribe's alternative contention that *Ex parte Young* served as a means by which to obtain relief in federal court. The tribe contended that

federal court jurisdiction existed to proceed in an action against the Governor to obtain injunctive relief.

However, the *Seminole* Court held the *Ex parte Young* doctrine inapplicable. The Court reasoned that in contrast to the "modest set of sanctions" Congress established in the IGRA, a suit under *Ex parte Young* would expose the defendant State official to the "full remedial powers of a federal court." Also, allowing a suit for relief under *Ex parte Young* would render ineffective the remedies Congress designed. The Court acknowledged that Congress has authority to establish federal court jurisdiction over State officials comparable to *Ex parte Young* jurisdiction, but concluded that Congress had not applied such authority when it wrote the IGRA. Of significance, the Court ruled that even though Congress' remedial scheme under the IGRA did not work because it violated the State's Eleventh Amendment rights, the Court could not "rewrite the statutory scheme in order to approximate what we think Congress might have wanted." *Seminole*, 517 U.S. at 74-76.

The *Seminole Tribe* decision places an obligation on the federal courts to examine Congressional intent with respect to the scope of statutory remedies that may be available in any case where the *Ex parte Young* doctrine is asserted to remove the Eleventh Amendment bar. Application of the Supreme Court doctrine espoused in *Seminole* must lead to the conclusion that finding jurisdiction under *Ex parte Young* in this instance would be inappropriate. In *Seminole*, the Supreme Court found that when a statute implies that Congress intended an alternative, specific form of relief be available to enforce compliance with that statute, a court should infer that Congress did not intend the federal court to provide traditional *Ex parte Young* injunctive relief.

The Tenth Circuit recently applied the *Seminole* analysis to reach the conclusion that Titles IV and XX of the Social Security Act created detailed remedial schemes for enforcement. In *Joseph A. v. Ingram,* 262 F.3d 1113 (10th Cir. 2001), the Tenth Circuit noted that under Title IV the State's were required to adhere to a comprehensive set of statutory and regulatory standards imposing federally-defined objectives, administrative procedures and appeals. The Titles also provide for federal oversight of the plans by the Department of Health and Human Services ("HHS"). HHS has the authority to dictate the terms of the plan. States that fail to comply with the planning face a reduction in their funding eligibility. The Tenth Circuit held that the comprehensive statutory and regulatory provisions governing Titles IV and XX demonstrated that Congress meant to preclude reliance on the broad provisions of an *Ex Parte Young,* suit to enforce the federal statutory standards.

Applying the *Ingram* analysis to the 1996 Act, this Court must conclude that the 1996 Act is a detailed remedial scheme. The State commissions are required to adhere to a comprehensive set of statutory and regulatory standards imposing federally defined objectives and administrative procedures. *See*, §§252(b)(4), (c), (d), (e)(1) and (e)(2). The 1996 Act provides for federal oversight by the FCC. *See*, §251(d). Failure of a State commission to carry out its responsibility in a proceeding may result in the FCC preempting the State commission's jurisdiction over that proceeding. §252(e)(5).

Furthermore, the remedial scheme of the 1996 Act includes a federal court remedy to allow for a review of an interconnection agreement to determine whether the agreement complies with §§251 and 252. But this federal court remedy does not contemplate injunctive relief. In addition, the 1996 Act imposes no set of judicial sanctions

against a state commission for failure to timely adhere to the expedited timetable. Clearly, the federal court relief available under §252(e)(6) is far less onerous than the relief that would be available pursuant to an *Ex parte Young* suit. Section 252(e)(6) only allows for a review of an interconnection agreement whereas an *Ex parte Young* action against a state commission would expose the Commissioners to the full remedial powers of a federal court, including presumably, contempt sanctions. Thus, to allow an *Ex parte Young* action against the Commissioners would be to "rewrite the statutory scheme", render superfluous the limited statutory remedy provided under §252(e)(6) and would permit the plaintiff to obtain relief against the individual Commissioners that they could not otherwise obtain pursuant to §252(e)(6).

Any attempt to achieve jurisdiction through the *Ex parte Young* fiction rather than through a §252(e)(6) action will frustrate Congress' clear intent that the 1996 Act provides the ***exclusive*** remedies against the state commissions. Like the statute in S*eminole,* §252(e)(6) does not "stand alone" but was created in the context of a carefully crafted remedial scheme. Just as the *Seminole* Court refused to replace Congress' unconstitutional attempt to abrogate states' immunity with a judicially created remedy, so to should this Court refuse to apply *Ex parte Young* to the 1996 Act.

Another factor militating against use of *Ex parte Young* relief is the fact that Congress clearly intended for §252(e)(6) actions to proceed against State commissions, not individual commissioners.

In *Seminole*, the Court observed that the statute indicated that Congress clearly contemplated that the state would be the respondent and repeatedly referred to "the

State." *Seminole*, 517 U.S. at 75. According to the Court, where a statutory scheme unmistakably authorizes a State or its agency to act, as opposed to an individual State official, *Ex parte Young* does not provide a vehicle whereby relief may be obtained. *Id.* 75 n.17. Thus, the *Seminole* Court determined that absent explicit Congressional authorization, Courts should not permit the use of an *Ex parte Young* actic to negate a state's sovereign immunity.

In *Seminole*, the Court looked to the federal statute at issue and determined that it was not Congress' intent to create a cause of action against the state officials, relying on a literal reading of the statute to support this analysis. Thus, in order to determine whether Verizon's action against the Commissioners may proceed, this Court is required to determine whether Congress intended to limit the availability of *Ex parte Young* suits over a cause of action brought under the 1996 Act.

In the 1996 Act, **all** of the provisions in §§251 and 252 refer to the "State Commission" or "the State" and **none** of the provisions refer to individual State commissioners. Section 252(e)(6), the statutory provision relied upon by the plaintiffs to initiate this case, is entitled "Review of State Commission Actions". That heading alone implies that an appeal will be filed against the State Commission. Section 252 refers forty-five times to the "state commission" with four such references contained in the subsection headings. See, 47 U.S.C. §§252(b)(4)(e), (e)(6), and (f)(2). Section 252 never refers to individual state commissioners. This overwhelmingly demonstrates that Congress designed the §252(e)(6) action to proceed against the **State commission**.[26]

[26] In fact, the actions Verizon complained of could not be accomplished by any of the five Commissioners acting alone. The Commission only can act by majority vote on such a matter. It is the action of the Commission as an entity that is required under the 1996 Act as a

It is illogical to infer that Congress intended to subject State commissioners to broad federal injunctive relief and contempt powers. Congress would have expressly provided for such a significant remedy had it intended to do so. Thus, the district court was without jurisdiction to proceed against the individual commissioners.

The Congressional remedy crafted into the 1996 Act does not authorize a suit against a state official as required by *Seminole*, 517 U.S. at 75. Congress' remedial scheme does not include State commissioners as parties to actions brought under §252(e)(6). "When Congress crafts particular remedies for particular wrongs, the presumption is that these are the exclusive remedies and that such limitations as they may embody are not to be circumvented . . . " *McDonnell v. Cisneros*, 84 F. 3d 256, 261 (7th Cir. 1996). The fact that Congress created on unconstitutional remedy, which allowed for suit against the state does not change this result.

This Court should find that, pursuant to the rule espoused in *Seminole*, Congress did not provide for the type of relief available under *Ex parte Young* in the 1996 Act.

Another critical limitation on the *Ex parte Young* doctrine is that a State officer must have exceeded his authority in order to be subjected to an *Ex parte Young* suit. As the Court explained in *Larson v. Domestic & Foreign Comm. Corp.* 337 U.S. 682 (1949), an *ultra vires* claim exists on "the officer's lack of delegated power. A claim of error in the exercise of that power is therefore not sufficient" *Pennhurst*, 465 U.S. at 101 n. 11 (quoting *Larson v. Domestic & Foreign Comm. Corp.*, 337 U.S. 682, 690 (1949)). Thus, mere assertions of good faith error in the

prerequisite to judicial review by this Court, not the actions of the individual Commissioners.

exercise of lawful authority, such as Verizon's contention that the Maryland Commission misinterpreted the FCC Order, do not support an action under *Ex parte Young*.

Verizon's suit falls well beyond the ambit of the *Ex parte Young* paradigm. The Maryland commissioners are not alleged to have violated any constitutional provisions, nor are they alleged to have exceeded the scope of their authority under the 1996 Act. Verizon did not contend that the commissioners failed to perform a mandatory duty nor interpreted or applied state law in a manner contrary to the United States Constitution or federal law. Verizon must concede that the Maryland Commission was empowered to consider its dispute, Verizon itself selected the initial forum. Thus, there can be no contention that the commissioners have acted on a matter that is outside their jurisdiction. Because a claim of error in the exercise of lawful authority is not sufficient to strip the Commissioners of their sovereign immunity, Verizon's suit is barred by the Eleventh Amendment. *Pennhurst,* 464 U.S. at 101 n. 11. (quoting Larson, 337 U.S. at 690).

III. THIS COURT SHOULD UPHOLD THE FOURTH CIRCUIT'S APPLICATION OF THE *ROOKER-FELDMAN* DOCTRINE.

The *Rooker-Feldman* doctrine stems from two Supreme Court cases decided sixty years apart. In *Rooker v. Fidelity Trust Co.,* 263 U.S. 413 (1923), the Supreme Court held that lower federal courts lack jurisdiction to entertain appeals from state court judgments because that power is reserved to the Supreme Court. In 1983, the Supreme Court decided *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462 (1983), clarifying *Rooker* and giving the *Rooker-Feldman* doctrine its name. In *Feldman,* the

Supreme Court held that lower federal courts have no jurisdiction to hear "challenges to State court decisions in particular cases arising out of judicial proceedings", *Id.* at 486, or decide questions "inextricably intertwined" with State court judgments. *Id.* at 483 n. 16.

The *Rooker-Feldman* doctrine is founded on two main inferences derived from provisions of Title 28 of the United States Code. The first inference is that 28 U.S.C. §1257, which gives the Supreme Court appellate review of certain State court decisions, is the only federal statute that explicitly provides for federal review of State court decisions. Congress granted original jurisdiction to federal district courts under a variety of statutes, including 28 U.S.C. §§1331 and 1332. Under this statutory scheme, federal district courts are courts of original, not appellate jurisdiction. Thus, by inference, 28 U.S.C. §1257 granted jurisdiction exclusively to the Supreme Court to review final judgments or decrees from the highest court in a state. The second inference is that Congress intended to foreclose all other forms of federal court review of State decisions. Because Congress only gave the Supreme Court the explicit authority to review the decisions of a state court, Congress meant to deny all other federal courts that power.

Thus, the *Rooker-Feldman* doctrine is an extension of the principle that federal courts are courts of limited jurisdiction. Also underlying the *Rooker-Feldman* doctrine is the idea of federalism. The doctrine is designed to preserve the two distinct legal systems so that each may proceed independently of the other with the Supreme Court as the final arbiter of any federal questions raised in either system. The policy reasons which underlies the doctrine apply just as readily to state agency decisions rendered in quasi-judicial proceedings as they do to State court decisions.

As noted earlier, the *Feldman* Court found that the federal district court was "without authority to review final determinations of the [D.C. Court] in judicial proceedings. Review of such determinations can be obtained only in this Court. *See*, 28 U.S.C. §1257." *Feldman,* 460 U.S. at 476. In reaching this conclusion, the Supreme Court analyzed the crucial question whether the proceedings before the D.C. Court "were judicial in nature" so as to bring these proceedings under the ambit of *Rooker*.

Interestingly, the leading case relied upon by the *Feldman* Court was *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210 (1908), where the Supreme Court acknowledge that the Virginia State Corporation Commission is, at least for some purposes, a court. 211 U.S. at 224. *Prentis* also held that:

> A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist . . . . Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.

211 U.S. at 226. The *Feldman* Court agreed with the *Prentis* finding that the question regarding whether a proceeding is judicial in nature "depends not upon the character of the body but upon the character of the proceedings." 460 U.S. at 477. The *Feldman* Court found that the proceedings at issue were judicial in nature because the tribunal "was called upon to **investigate, declare and enforce** liabilities as they stood on present or past facts and under laws supposed already to

exist." *Feldman*, 460 U.S. at 479. (emphasis added) Consequently, the *Feldman* Court ruled that the district court lacked subject matter jurisdiction over applicants' claims for individual relief.

This Court has recognized that it is "within the power of the States, as it is within the power of the Federal Government, to transfer some adjudicatory functions to administrative agencies, with the opportunity for subsequent judicial review." *Printz v. United States,* 521 U.S. 898, 929 n.14 (1997) (citing *Crowell v. Benson*, 285 U.S. 22 (1932)) Similarly, as noted above, this Court has established that an administrative agency engaged in adjudication is performing a judicial act. *See, Prentis v. Atlantic Coast Line Co.,* 211 U.S. at 224-26. The proposition that State agencies perform judicial acts was the very premise of *FERC v. Mississippi,* 456 U.S. 742, 760-61 (1982), which held that *Testa v. Katt,* 330 U.S. 386 (1947), requires a State administrative agency to apply federal law when it adjudicates disputes arising within its jurisdiction. *See*, 456 U.S. at 760.[27]

The MDPSC clearly functions as a Court in some circumstances. The Maryland Commission has the powers of a court of record to administer oaths, compel the attendance of witnesses and production of documents and enforce compliance with its orders through fines and other penalties as prescribed or authorized by law. *PUC* §§3-104, 3-109, 3-110, 3-111, 10-402. Finally, like other Courts, the Maryland Commission must afford all parties reasonable notice of proceedings, an opportunity to be heard, and the opportunity to present evidence. *PUC* §§3-102, 3-103, 3-107.

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[27] *See, also, Printz,* 521 U.S. at 929 n. 14. ("We have no doubt that *FERC* would not have been decided the way it was if *non* adjudicative responsibilities of the state agency were at issue").

The Maryland Commission, a State administrative agency with longstanding expertise in the regulation of local telephone service, exercised the judicial power granted it under Maryland law when it adjudicated Verizon's Request for a Declaratory Order. The proceeding which resulted in the MDPSC Order at issue was, in every sense, an exercise of judicial power. It commenced when Verizon filed a request for declaratory order, included a prehearing conference, intervention and participation by fifteen parties and a full hearing. The proceeding culminated with the Maryland Commission's adjudication of the rights of the parties under pre-existing interconnection agreements and in arbitrations currently before the MDPSC.

In the proceedings before the Maryland Commission, the Maryland Commission investigated facts, conducted an adversarial hearing, declared its conclusions and enforced liabilities against a specific party as they stood on present facts and under laws that already existed. Given the general principles discussed above, the Maryland Commission must be found to have acted in a judicial capacity. See, e.g. *Ohio Civil Rights Comm'n v. Dayton Christian Schools,* 477 U.S. 619 (1986) (state civil rights commission proceedings deemed "judicial" in nature.)

Petitioners' reliance on *City of Chicago v. International College of Surgeons,* 522 U.S. 156 (1997) is misplaced. Contrary to the United States' assertion, this Court did not find that general statutory language is sufficient to confer jurisdiction over suits challenging the decisions of a State agency as contrary to federal law. *City of Chicago* merely held that federal district courts can exercise supplemental jurisdiction over State claims that call for deferential on-the record review of a State administrative order when the court already possesses original jurisdiction over another claim. In *City of Chicago,* the district court

exercised original jurisdiction over the federal constitutional claims, which were not bound by the administrative record. 118 SCt. at 531.

The Rooker-Feldman doctrine advances the policy of preserving the autonomy of both sovereigns and preventing undue incursions of one upon the other. In applying the *Rooker-Feldman* doctrine, the Fourth Circuit recognized the judicial nature of the proceedings involved and properly found that the concept of federalism inherent in our system requires the federal district court to refrain from taking jurisdiction over this case.

CONCLUSION

For the reasons set forth above, the decision of the United States Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

Susan Stevens Miller
General Counsel
Maryland Public Service Commission
6 St. Paul Street, 16th Floor
Baltimore, Maryland 21202
(410)767-8039